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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 141

STANLEY H. BORAK,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

STANLEY H. BORAK,
Pro Se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 141

STANLEY H. BORAK,

Petitioner,

against

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Supreme Court of the United States:

Your petitioner, Stanley H. Borak, respectfully represents and petitions as follows:

Summary Statement of the Matter Involved

Petitioner sued for the salary of the office which he held for the period following his wrongful discharge therefrom. While holding that he was entitled to such salary, the Court of Claims deducted therefrom as a "just credit" and offset,

outside earnings of the petitioner during the period in question.

The stipulated salary attaching to the office for the period in question amounted to $7038.43. After deducting the "just credit" for his outside earnings, the Court awarded petitioner $1770.70.

The Government conceded that, if the petitioner were held to be an officer (as the Court did hold), he was entitled, under the well-established rule of law, to the salary of the office without offset for outside earnings.

Judge Madden, dissenting, in favor of petitioner on this point, declared that the Court should not abrogate the well-established rule, especially when no one asked that it be changed.

Summary Statement of Facts

The Special Findings (R. 6 et seq.) show that petitioner passed a competitive Civil Service examination for Junior Legal Assistant in 1940; he was duly appointed United States Naturalization Examiner in the Immigration and Naturalization Service of the Department of Justice. After four months, he was rated "satisfactory" in all respects; later, a contrary conclusion was reached. After nine and one-half months in office, he was handed a notice of summary dismissal on January 3, 1942. This notice alleged that his work was generally unsatisfactory and below the average and that he lacked aptitude. He vigorously protested this dismissal as contrary to and without basis in fact. All protests were denied. Finally, petitioner sued for mandamus in the District Court of the United States for the District of Columbia to compel his reinstatement to office; for a declaratory judgment of his rights; for examination of his service ratings which had not been disclosed to him, and for salary since the dismissal. The Dis-

trict Court dismissed the complaint without opinion. On appeal, the Court of Appeals for the District of Columbia upheld petitioner's claim that he had been illegally dismissed, contrary to 5 U.S.C. 652 (Act of August 24, 1912; Sec. 6, 37 Stat. 539), requiring preference of written charges and opportunity to reply, etc., before dismissal of persons in the classified service. (*Borak* v. *Biddle,* 141 F. 2d 278). The Court of Appeals directed that petitioner be restored to office. As to the claim for salary, it declared that under the provisions of the Tucker Act, (Judicial Code, Section 24(20), 28 U.S.C. 41(20)), the District Court had no jurisdiction over petitioner's claim for salary, since jurisdiction of salary claims by officers is by that Act vested exclusively in the Court of Claims.

Petitioner then applied to this Court for a writ of certiorari, contending that under his plea for a declaratory judgment of his rights and to avoid circuity of remedy, this Court should decide his right to salary after the illegal dismissal; petitioner further contended that the record clearly showed that his dismissal had been arbitary and without justification, and that his second set of service ratings and the alleged grounds for dismissal should be declared null and void and set aside. Certiorari was denied without opinion (*Borak* v. *Biddle,* 323 U. S. 738).

After no action by the General Accounting Office on his claim for salary, petitioner instituted suit in the Court of Claims for the salary of the office. The stipulated amount of salary to which petitioner was entitled for the period of wrongful exclusion from the office was $7,038.43.

The Court of Claims overruled the defense of the Government that the Act of August 24, 1912, 5 U.S.C. 652, providing for preference of charges, opportunity to reply, etc., before dismissal of any person in the classified service, was merely directory, and not mandatory. It also overruled

the partial defense that another person performed the duties of the office for a period after petitioner's dismissal. The further defense that petitioner was not an officer but an employee, was overruled by the Court of Claims.

The Government conceded that if the foregoing defenses were overruled and petitioner held to be an officer (which the Government had in the prior action consistently asserted was the case), then petitioner was entitled to the full salary as stipulated. (Brief below, p. 91) (Also referred to in majority opinion, R. 13, and in minority opinion, R. 17).

The majority of the Court of Claims, *sua sponte,* and without notice that such course was contemplated, deviated from the well established rule, and declared that outside earnings of the petitioner during the period in question had to be deducted from the stipulated salary. In its opinion, the Court stated that the action was not one for "damages," but for the salary of the office, as to which it declared: "The salary was an incident of the office, and as this Court has repeatedly held is not payable to those who do the work, but to those who hold the office." The result it reached shows that the Court decided to award "damages," contrary to its own premises. Petitioner was thus awarded the sum of $1770.70 instead of $7038.43, which the Attorney General conceded was due, his other defenses having been overruled.

Judge Madden dissented (R. 17) on the ground that since no one had asked the Court to change the well established rule, it should not do so on its own initiative. He further pointed out that the "credit" to which the majority held the Government was entitled because of petitioner's earnings was not a proper credit at all, or an offset.

The Court of Claims found that, in addition to the time petitioner spent in seeking restoration to the position from

which he was dismissed and for the recovery of his salary, he had been compelled to expend more than $500 for court costs, printing charges, postage and other necessary disbursements in connection with such litigation. (R. 13, finding No. 13). The majority refused to consider these, while granting the Government a "just credit" for the amount of petitioner's earnings.

The majority opinion allowed no credit to petitioner for his necessary expenses or for his time occupied in prosecuting the right to reinstatement and salary. It awarded no interest or costs.

The result reached by the Court of Claims thus appears: (1) contrary to all precedent; (2) confusing as to the rule of law now to prevail; (3) illogical from its own premises; (4) in disregard of the issues; and (5) unfair to petitioner. The unfairness of the decision is apparent upon consideration of the cost in time and money alone to petitioner; but his record and reputation were permanently damaged by the unjustified ratings which he sought in vain to have reviewed. The apparently unfavorable attitude of his local superior officers caused petitioner upon reinstatement to request a leave of absence to seek a civil service position in another department* (R. 10, Finding No. 6).

Nevertheless, the Solicitor General assured this Court in his brief that "Petitioner has prevailed on the major issue in this case." (p. 4, brief of Solicitor General in opposition to petitioner's application for certiorari, *Borak* v. *Biddle,* 323 U. S. 738.) Petitioner has spent very considerable time and effort in seeking administrative redress in vain, in filing for court review, which required an appeal,

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* By reason of the provisions of Executive Order 9063 eff. January 16, 1942, all appointments during the war were war duration only. The Attorney General refused, without explanation, to give petitioner an additional leave of absence without pay to enable him to try further to obtain a position in another agency (R. 11, Finding No. 8).

in petitioning for certiorari to avoid a second court action, in the second court action required, and has expended considerably over $500.00 in disbursements (R. 13, Finding No. 13). To date, his triumph on the "major issue" appears to have been somewhat in the nature of a Pyrrhic victory.

A glaring injustice will be redressed if this Court grants certiorari, and upholds the settled rule of law.

Jurisdiction

The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925 as amended.

The judgment of the Court of Claims was entered March 1, 1948; its order overruling petitioner's motion for a new trial of March 29, 1948, was filed on May 3, 1948.

Opinions

The majority opinion of the Court was written by Howell, J. (R. 13). Madden, J. dissented (R. 17), stating in his opinion that petitioner's earnings did not constitute a governmental credit to be set off against the salary of the office acknowledged to be due. These opinions are not yet reported. In the prior action, no opinion was written by the District Court; the opinion by the Court of Appeals for the District of Columbia was written by Groner, Ch. J. (*Borak* v. *Biddle*, 78 App. D. C. 374, 141 F. 2d 278), cert. den. 323 U. S. 738.

Question Presented

1. Whether outside earnings of an officer of the United States during the period of illegal exclusion from office are to be offset against the salary of the office to which he is entitled; and if so, whether any corresponding credits in favor of the officer, such as interest, court costs, disbursements, etc. should be allowed.

The Court of Claims has unsettled the long-established rule of law, and the question presented is whether the settled rule shall prevail, or some other rule be established.

Reasons Relied On for the Allowance of the Writ

(1) The question is an important question of Federal substantive law; the decision below is contrary to the applicable decisions of this Court in *United States* v. *Addison,* 6 Wallace, 290, and in the other cases cited in petitioner's brief; it represents a recurring question, inasmuch as from time to time, officers institute suits for salary after wrongful dismissal or after leave of absence. The law should be settled.

(2) The decision below appears both illogical and unjust. The majority opinion concedes "this is not an action for damages . . .," and declares "the salary was an incident of the office, and as this Court has repeatedly held, is not payable to those who do the work, but to those who hold the office." It then inconsistently attempts to follow the rule of "damages" by allowing the government a "just credit" for petitioner's earnings in the private practice of the law, but all to petitioner's detriment, gives no consideration to his considerable expenses, time and other loss sustained. It is a harsh and inequitable result.

(3) It is submitted that it is contrary to proper procedure, for a lower court to depart from the issues presented, and, *sua sponte,* and without prior notice, to repeal a long established rule of substantive law of this Court. If long established rules of substantive law are to be abrogated, where neither the petitioner nor the government had so requested, it would seem that only this Court should so decree, after opportunity to both sides to state their views.

Unquestionably the law is now in confusion, and until a decision by this Court, will remain so.

WHEREFORE, petitioner prays that a writ of certiorari issue to review the judgment entered on March 1, 1948, in the Court of Claims of the United States in the above cause.

Dated, July 1948.

STANLEY H. BORAK,
Petitioner Pro Se.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 141

STANLEY H. BORAK,

Petitioner,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

To the Honorable the Supreme Court of the United States:

Jurisdiction

The statement of jurisdiction is in the foregoing petition.

Statement of the Case

The facts have been set forth in the foregoing petition.

Summary of Argument

POINT I

The Court of Claims has created confusion in the law and reached a harsh and inequitable result in not following

the established rule of law that an officer is entitled to the salary of the office after wrongful dismissal without offset for private earnings.

POINT II

The judgment of the Court of Claims should be modified accordingly in the interests of justice, and in accordance with the doctrine of *stare decisis*.

ARGUMENT

POINT I

THE COURT OF CLAIMS HAS CREATED CONFUSION IN THE LAW AND REACHED A HARSH AND INEQUITABLE RESULT IN NOT FOLLOWING THE ESTABLISHED RULE OF LAW THAT AN OFFICER IS ENTITLED TO THE SALARY OF THE OFFICE AFTER WRONGFUL DISMISSAL WITHOUT OFFSET FOR PRIVATE EARNINGS.

The law is well settled that an officer after wrongful dismissal is entitled to the salary of the office without offset for private earnings during the period in question. The specific point was raised in *United States* v. *Addison*, 6 Wallace, 290. The Supreme Court there held that the rule which measures damages upon a breach of contract is inapplicable to a suit for salary by a government officer and that private earnings may not be deducted from the amount of salary owing.

> "The officer is entitled to recover the full compensation of the office without crediting his earnings thereon." (46 C.J. 1029, "Officers," Sec. 281).

As Judge Madden, dissenting below, states: "the authorities are numerous and practically unanimous to that

effect" (150 A.L.R. 100, et seq.). The Attorney General agreed that this was the correct rule, and did not ask for its repeal or modification. The Court acted *sua sponte*, the point of deviation never having been discussed either on the argument or in the briefs.

The rationale of the rule as stated in *Fitzsimmons* v. *City of Brooklyn*, 102 N. Y. 536, is as follows:

> "The rule of damages has no application to the case of an officer suing for his salary, and for the obvious reason that there is no broken contract or damages for its breach where there is no contract. We have often held that there is no contract between the officer and the State or Municipality by force of which the salary is payable. This belongs to him as an incident of his office and so long as he holds it; and when improperly withheld, he may sue for it and recover it. When he does so, he is entitled to its full amount, not by force of any contract, but because the law attaches it to the office; and there is no question of breach of contract or resultant damage, out of which the doctrine invoked has grown. We think, therefore, it has no application to the case at Bar and the courts below were right in refusing to diminish the recovery by applying the wages earned." (pp. 538-9).

In a series of salary cases brought by officers, this court awarded the full salary of the office without offset or credit for the salaries which these officers had earned while on leave. *United States* v. *Andrews*, 240, U. S. 90, aff'g. 49 C.Cls. 391; *United States* v. *Reed*, 265 U. S. 570 (mem.), aff'g 56 C.Cls. 500 (mem.).

Other salary cases where the Government appeared entitled to a "just credit" by reason of considerations of actual estoppel, but where this court held to the contrary, are *Glavey* v. *United States*, 182 U. S. 595, rev'g 35, C. Cls. 242, and *U. S.* v. *Bancroft*, 260 U. S. 706, aff'g. 56 C. Cls. 218.

See also *Trotter* v. *United States*, 62 C. Cls. 568, 63 C. Cls. 692.

Petitioner has found no case where outside earnings of an officer were offset against the salary of the office to which he was entitled.

The result reached by the Court of Claims is harsh and inequitable in the instant case. It awards petitioner $1770.00, the difference between his salary in office and his earnings in private practice of the law during the period in question. It allows no interest and no costs. It refuses to consider well over $500 in necessary expenses by petitioner, the tremendous amount of time required to be spent by him, and other adverse factors.

A consideration of controlling decisions by the Supreme Court shows that it has consistently applied the rule of law that salary is an incident to office, and that no credit or offset for earnings, howsoever arising, will be allowed.

In *United States* v. *Andrews*, 240 U. S. 90, aff'g. 49 C. Cls. 391, the Supreme Court held that an officer was entitled to the salary of the office, regardless of equities, and without regard to his earnings in private employment. The Court of Claims had originally dismissed as inequitable the claim of this officer who had taken leave of absence without pay to enter remunerative commercial employment. (47 C. Cls. 51). Upon motion for a new trial, it overruled its prior decision and declared that no equitable principle could prevent the officer from recovering the salary of the office, nor required any offset or "just credit" for earnings from his commercial position. The Supreme Court agreed.

In *United States* v. *Bancroft*, 260 U. S. 706, aff'g. 56 C. Cls. 218, the plaintiff, in exchange for valuable consideration given by the Government, waived a sum due. Thereafter he sued for the money he had so waived. Judgment was entered in his favor for the compensation attach-

ing to the office, neither just credit, offset nor even the apparent estoppel being allowed as a defense.

In *Glavey* v. *United States,* 182 U. S. 595, revg. 35 C. Cls. 242, this Court dismissed an officer's claim for salary as "fraud in fact and law," and held him "estopped on every principle of law and equity." It accused the plaintiff of seeking to enjoy "the feast of a second office having inconsiderable duties, while enjoying emoluments of an office already held." While the Supreme Court did not dispute these facts, it held that the officer must recover the salary attached to the second office (although he had accepted it as "without pay"). No offset or "just credit" was allowed for the salary of the first office received without any services rendered therefor.

In *United States* v. *Reed,* 265 U. S. 570 (no op.) aff'g. 56 C. Cls. 500 (no op.), the award was for $3,104.18, the salary attaching to the office. The record in the *Reed* case shows that plaintiff had made an agreement with the United States, in applying for leave of absence to take a remunerative job, not to claim the salary attaching to his office. Solicitor General James M. Beck's brief in the Supreme Court stated: "The position of the claimant has appeared to us to be so unconscionable, so directly opposed to every consideration of good faith and fair dealing that we have felt obliged to present the case to the Supreme Court." Nevertheless, the Supreme Court affirmed, on the authority of the *Andrews* case, *supra.* No credits nor offsets were allowed.

See also *Reinhard* v. *United States,* 10 C. Cls. 282.

In all of the foregoing cases, the plaintiff pleaded as required by statute, (28 U. S. C., Sec. 265) that there was no "just credit" due the Government. Likewise, Section 250 (2) of Title 28, U. S. C. A. was at all times in effect when the foregoing cases were decided; in no case did the Court

offset the outside earnings. (See Act of March 3, 1863, 12 Stat. 765, 767.)

In the above-cited cases, both the Court of Claims and the Supreme Court applied the settled rule of law that salary is a mere "incident" of the office; it is not based on contract. As is stated in 100 A. L. R. at page 103, "Once this principle is accepted (salary as an 'incident of office' and not based on contract), the result is inevitable," (that private earnings may not be deducted).

This Court has explicitly so declared in *United States* v. *Addison*, 6 Wallace, 290.

Judge Madden's terse opinion adequately states why, in the instant case, the established rule should be followed.

In state cases, the same rule is applied; no "credit" is allowed for the officer's earnings in other employments. 100 A. L. R. 104 et seq., collecting the authorities.

The plaintiff's earnings do not constitute a true "credit," or set-off at law. In *re: Ford*, 14 F. 2nd, 849; in *re: Oliver*, 109 F. 784, 786. The jurisdictional statute, 28 U. S. C. 250 (2), does not mention "credits"; it limits setoffs to "demands." A demand is an independent cause of action. Rule 21 of the Court of Claims requires set-offs to be pleaded. No set-off was herein pleaded. The Court below acted entirely on its own accord in refusing to follow the issues presented for its decision.

The rule that the Court of Claims has applied appears to be that which is used to measure damages in breach of contract cases; except that in breach of employment contract cases interest and costs are awarded the injured party; however, the court's opinion expressly holds that plaintiff "was not working under a contract with a fixed time limit on the holding of the office."

In point of fact, plaintiff's actual loss cannot be measured by deducting earnings in private practice from the salary of the office.

This litigation arose from an entirely unjustified dismissal from public office. The Government at all times avoided consideration of the merits. It had denied plaintiff an appeal to the statutory Board of Review. (See record *Borak* v. *Biddle, Atty. Gen.*, 323 U. S. 738.)

Plaintiff has spent well in excess of 1500 hours in endeavoring to redress this wrong, and, to date considerably more than $500 in necessary cash disbursements. The unfounded ratings and conclusions of the Department of Justice, have permanently damaged his reputation and impaired future opportunity to obtain competitive public employment. Plaintiff was compelled to abandon a career in Government Service to his manifest injury. Pension rights were cancelled. Most Naturalization Examiners, including his alleged replacement, received statutory increments, and reclassification to P-3, at a salary of $4400 a year. Plaintiff lost the use of the moneys due. Mental suffering inevitably followed. These are all judicially recognized elements of damage.

Adherence to the rule of *stare decisis* helps to make this a government of laws, not of men. In the instant case, both justice and precedent, require modification of the judgment of the Court of Claims.

Conclusion

This Court should grant certiorari to determine whether a rule of substantive law so solidly entrenched should be overthrown. Petitioner should have an opportunity to urge why the established rule should not be abandoned, and the Attorney General should be heard. Judge Madden said: "I would let the rule stand until someone asked us to change it, and at least give us some reason for initiating the contrary rule." This Court's decision will overcome the uncertainty and confusion into which the Court of

Claims' decision has thrown the law on this frequently recurring point; and finally, the unjust and inequitable result reached below should be remedied.

Point II

The judgment of the Court of Claims should be modified accordingly in the interests of justice and in accordance with the doctrine of *stare decisis*.

Respectfully submitted,

Stanley H. Borak,
Petitioner Pro Se.

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SUPREME COURT OF THE UNITED STATES

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PETITIONER'S REPLY BRIEF

STANLEY H. BORAK,
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SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES

PETITIONER'S REPLY BRIEF

The Government's brief contains a number of statements requiring a reply.

I

Petitioner's position is that an *officer,* as distinguished from an *employee,* must recover the full salary of the office, without offset for earnings.[1]

The Government's brief indifferently lumps officers and employees together as "civil servants," and asserts (at p. 6) that the decisions announce but one rule of law uni-

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[1] Corpus Juris and American Law Reports (Annotated), are quoted to such effect in petitioner's main brief (pp. 10, 14). Mechem says: "When the officer who has been unlawfully deprived of his office is found to be entitled to recover, the amount that he has earned in the interval at other employment is not to be deducted." ("The Law of Public Offices and Officers," p. 584, sec. 872). Throop on "Public Officers," agrees (pp. 489-90). Likewise, McQuillin, on "Public Corporations," Revised Vol. 2, sec. 539, p. 319).

formly applied to both, namely, that outside earnings during the period of dismissal are deductible from the salary of the office or employment. This is altogether erroneous.

In its brief below, the Government recognized the distinction:

> "It is true that the rule (of deduction of outside earnings) does not apply to an officer suing for his salary, for there the salary is attached to the office. *United States v. Addison,* 6 Wall. 290; *Smith v. Board of Education,* 23 F. Supp. 328, aff'd 111 F. (2d) 573; *Fitzsimmons v. Brooklyn,* 102 N. Y. 536." (p. 91, Government's brief in the Court of Claims).

In the *Addison* case (supra), the "complete in applicability" of which the Government's present brief asserts (p. 6, footnote), this Court held:

> "The rule which measures the damages upon a breach of contract for wages or for freight, or for the lease of buildings, has no application. In these cases, the party aggrieved must seek other employment, or other articles for carriage, or other tenants, and the damages recovered will be the difference between the amount stipulated and the amount actually received or paid. But no such rule can be applied to public offices of trust or confidence, the duties of which are not purely ministerial or clerical."
>
> (*United States* v. *Addison,* 6 Wall. 290, 298).

The *Smith* case (*supra*), cited by the Government below, accepts the rule of law of the *Fitzsimmons* case quoted in petitioner's main brief, at p. 11.

Nor do the cases cited in the Government's present brief (pp. 6, 7) hold that an *officer's* outside earnings during the period of dismissal are deductible. Indeed, they hold to the contrary.

In *State ex rel. Dreskell* v. *Miami,* 153 Fla. 90, 92, 93, 13 So. (2d) 707, cited twice in the Government's brief, and

cited with approval in *Corfman* v. *McDevitt*, 111 Colo. 437 (also cited by the Government), the Court expressly distinguished the rule applying to the deductibility of earnings of an *officer* from that applying to the earnings of an *employee*. In *Wittner, Weinstein, Kelly, Barton, Seltzer and LaChicotte*, also cited by the Government as controlling, the plaintiff in each case was held an *employee*, not an *officer*. *Stockton* and *State Board* also cited by the Government, followed the *Kelly* case.

The Government's brief also cites 150 A. L. R. 113-120 in support of its contention. This annotation, which begins at page 100 of volume 150, shows, as Judge Madden pointed out, that the authorities are practically unanimous in holding that as to *officers*, outside earnings do not constitute an offset.

The overwhelming weight of State, as well as Federal authority, declares that the earnings of an *officer* during the period of dismissal, are not deductible from the salary of the office to which he is entitled, contrary to the majority holding below.[2]

II

Contrary to the Government's suggestion (p. 2), the Act of June 10, 1948, is not involved in the determination of the

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[2] The Government's brief suggests denial of the petition upon grounds which should be brought forward only in a cross-petition, since they were raised by the Government in the Court below, and rejected. *Inter alia*, it is suggested: (a) that "there may be doubt as to whether he (petitioner) was an officer or employee" (p. 6). The Court of Claims expressly ruled that plaintiff was an *officer* (R. 15, 16). It is further suggested that there was a "replacement" of petitioner, thereby making the *Fitzsimmons* case "obviously inapplicable." This was similarly adversely decided against the Government, the finding being made that petitioner was not "replaced" (R. 12). Accordingly, the *Barmonde* and *Mullane* cases cited in the Government's brief (p. 9) are completely inapplicable, and the rule of the *Fitzsimmons* case, is applicable. The *Fitzsimmons* case was followed by the New York Court of Appeals in *O'Neil* v. *State*, 223 N. Y. 40, 44.

question presented. That Act has prospective application only,[3] and the same is sharply circumscribed.

Nor, as the Government brief further asserts (p. 11), is the recurrence of the question here presented "eliminated." The question presented remains of continuing importance in Federal, as well as State, jurisprudence.

Cabinet officers, judges, postmasters, and the many other civil officers of lesser rank who are not in the "classified civil service" will at no time be affected by the amendment, in the event that any of them is wrongfully dismissed (*Humphrey's Excr.* v. *United States,* 295 U. S. 602). The identical question will recur.

Nor do the provisions of the amendment apply to army officers. Any of them wrongfully dismissed (*Shapiro* v. *United States,* 107 Ct. Cls. 650) will posit exactly the same question here presented.

Moreover, the amendment, being by its express terms prospective, as aforesaid, will not apply at all to causes of action presently accrued. Indeed, there are several cases involving the same issues presently pending.[4]

But the Government's brief also disregards the fact that the court below deducted the plaintiff's outside earnings on the ground of "just credit," thus bringing it in conflict also with the line of Federal cases which declares that there can be no such "just credit" asserted against the right of an officer to the salary incident to the office, under principles of public policy. (*Glavey* v. *United States,* 182 U. S. 595, and other cases cited in petitioner's main brief.)

The continuing importance of the question presented is thus evident.

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[3] Section 2 of the said Act expressly provides that its application is prospective only.

[4] See "Conference Report"—U. S. Code Congressional Service—1948—No. 6—at p. 3284.

III

The Government's assertion that the petitioner has been "indemnified" (pp. 7-8) is contrary to the fact found by the Court of Claims (R. 13) that more than five hundred dollars (increased by subsequent printing expenses in that court) was required to be spent by petitioner in connection with this litigation.

The word "indemnity" cannot fairly describe a situation where more than one-third of the amount recovered has had to be spent in necessary expenses (omitting attorney's fees) of litigation required to redress the unjust dismissal which the Government has always sought to gloss over. In addition to deprivation of salary,[5] intangible but real loss followed, as previously stated (petition pp. 5, 15).

The trend of modern jurisprudence and legislation is to grant full indemnity to the citizen injured by wrongful governmental action.[6]

Conclusion

The new amendment to sec. 652 of Title 5 (Act of June 10, 1948) does not materially affect the likelihood of recurrence of the question of law presented, important alike to Federal and State jurisprudence.

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[5] The Government's brief declares: "Petitioner at no time contended that in his capacity as Naturalization Examiner he would have been able to devote any of his time to the private practice of law" (p. 5). This was never within the issues of the case. However, recent opinions of the Attorney General find no bar generally to the conduct of any private business by an officer, or to the receipt by him of income from the earnings of a law partnership (Op. A. G. Vol. 40, Nos. 47 and 48).

[6] For instance, the recently enacted Federal Tort Claims Act, allowing recovery of damages against the Government for torts, provides for costs in all courts to be awarded the successful claimant to the same extent as if the United States were a private litigant. 28 U.S.C. 931. Petitioner was denied costs in all courts.

The petition should be granted for the reasons which have been stated.

Respectfully submitted,

STANLEY H. BORAK,
Petitioner Pro Se.

(8118)

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 141

STANLEY H. BORAK, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 13-17) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 1, 1948 (R. 18). Petitioner's motion for a new trial was overruled on May 3, 1948 (R. 19). The petition for certiorari was filed on July 7, 1948. The jurisdiction of this Court is

invoked under Section 3(b) of the Act of February 13, 1925, as amended.[1]

QUESTION PRESENTED

Whether, in computing back pay due a civil servant of the United States for the period of his wrongful removal from service, there should be deducted from the full pay to which he otherwise would be entitled, the amount he earned in private employment during that period.

STATUTE INVOLVED

The pertinent provisions of the Act of June 10, 1948 (Public Law 623, 80th Cong., 2d sess.) are set out in the Appendix, *infra,* pp. 12-14.

STATEMENT

This case arises out of petitioner's claim for the full Federal pay he would have earned had he not been dismissed from his civil service job. The following statement summarizes the facts as found by the Court of Claims (R. 6-13):

After passing a competitive civil service examination, petitioner, on February 21, 1941, was appointed probationally by the Attorney General as a naturalization examiner in the Immigration and Naturalization Service of the Department of Justice (R. 6-7). Petitioner entered on duty in

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[1] Effective September 1, 1948, the pertinent provisions of this Act are repealed and reincorporated into the new Title 28, United States Code at Section 1255. See Sections 1, 38 and 39, Act of June 25, 1948 (Public Law 773, 80th Cong., 2d sess.).

the New York City office of the Service on March 18, 1941 (R. 7). After four months, he was given an efficiency rating of "satisfactory" by the Chief Examiner of that office (R. 7). On November 14, 1941, after a total of eight months service, the same officer rated him "unsatisfactory" (R. 7). On January 3, 1942, petitioner was notified by the Attorney General that his probational appointment as naturalization examiner was being terminated and that he was relieved from duty at the close of business that day (R. 7). The notice of dismissal stated that his services had been "unsatisfactory generally"; that the quality of his work was "below the general standard"; and that he had displayed no "aptitude in performing the work of a naturalization examiner" (R. 7). Salary was paid to petitioner by the Service until January 19, 1942, when his accrued annual leave expired (R. 7, 13). On May 12, 1942, Milton A. Woocher, a naturalization examiner in the Detroit office of the Immigration and Naturalization Service was transferred to the New York City office to fill the vacancy created by the termination of petitioner's employment (R. 12). Petitioner promptly protested his dismissal and demanded a "hearing" pursuant to Section 6 of the Act of August 24, 1912 [2] and the rules of the Civil Service Commission governing the removal of employees in the classified civil serv-

[2] For text of Section 6, as amended by the Act of June 10, 1948, see Appendix, *infra*, pp. 12-14.

ice (R. 8). The Attorney General refused, ruling on July 14, 1942, that the procedure fixed by those provisions was not applicable to an employee, who, at the time of dismissal, was still serving out his probational period (R. 8).

Petitioner instituted suit against the Attorney General on July 30, 1942, in the District Court of the United States for the District of Columbia, seeking, *inter alia,* a declaration that he was entitled to notice and hearing before dismissal and a judgment for back salary from the date of his discharge (R. 8, 9). The district court granted the Attorney General's motion for a summary judgment (R. 9). On appeal, the United States Court of Appeals for the District of Columbia, reversed, holding that petitioner, at the time of his dismissal, was not a probationary employee but that he had become an absolute employee after six months of service. *Borak* v. *Biddle,* 141 F. 2d 278, certiorari denied, 323 U. S. 738. Accordingly, that court directed the issuance of a declaratory judgment, establishing petitioner's right, prior to dismissal, to the type of notice and hearing provided for by Section 6 of the Act of August 24, 1912. The court further held that the district court was without jurisdiction to award judgment for the back pay. (R. 9.)

On June 5, 1944, the district court entered a declaratory judgment in accordance with the Court of Appeals' opinion (R. 10), and on June 6, 1944, petitioner was advised by the Department of Justice of his reinstatement to office. He was

reinstated [3] on the next day and took leave without pay until August 31, 1944, when he voluntarily resigned (R. 11, 12). In May, 1944, petitioner filed a claim with the General Accounting Office for the amount of his salary during the period between his dismissal and reinstatement (R. 12). The General Accounting Office did not render any decision on the claim, and, on December 28, 1945, petitioner filed the instant suit in the Court of Claims (R. 1, 12).

The Court of Claims, relying on *Elchibegoff* v. *United States,* 106 C. Cls. 541, certiorari granted, 329 U. S. 704, writ dismissed on motion of United States, 329 U. S. 694, granted judgment to petitioner for the salary he would have drawn from the United States during the period of his illegal dismissal, but deducted the amount of his outside earnings during that period [4] as a "just credit and offset" under "the provisions of the jurisdictional act (Sec. 250(2) and Sec. 265, [28 U.S.C.]", and entered judgment for the difference (R. 17).

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[3] When petitioner was reinstated no change was made in the status of his replacement, Milton A. Woocher.

[4] Subsequent to his dismissal in January, 1942, petitioner obtained employment as an attorney in the private practice of law and has been continuously so employed since that time (R. 13). During the period between January 19, 1942, and June 7, 1944, that is the period of his removal from office, petitioner's earnings from private practice amounted to $5,267.62 (R. 13). He would have earned $7,038.43 as salary from the United States during that period had he not been removed (R. 12-13). Petitioner at no time contended that in his capacity as a naturalization examiner he would have been able to devote any time to the private practice of law (R. 17).

ARGUMENT

The question of whether earnings should be deducted from salary otherwise due was correctly disposed of by the Court of Claims. Moreover, the Act of June 10, 1948, (Public Law 623, 80th Cong., 2d sess.) Appendix, infra, pp. 12-14, by specifically providing for such deductions, has stripped that question of any general importance. We accordingly submit that its review by this Court is unwarranted.

1. Petitioner, in attacking the allowance of the offset against the damages claimed by him for wrongful exclusion from his civil service position, stresses the fact that the Court of Claims characterized him as an "officer" (Pet. 4, 7, 10). However, while there may be doubt as to whether he was an officer or employee, it is indisputable that the position he occupied was in the civil service. And it has uniformly been held that outside earnings of any civil servant during the period of his wrongful suspension or removal from his civil service job constitute a proper offset. 150 A.L.R. 113-120. See also *Wittner* v. *United States,* 76 F. Supp. 110, 113 (C. Cls.); *Weinstein* v. *United States,* 109 C. Cls. 579, 581-582; *Kelly* v. *State Personnel Board,* 31 Cal. App. 2d 443; *Corfman* v. *McDevitt,* 111 Colo. 437; *State ex rel. Dresskell* v. *Miami,* 153 Fla. 90; *Barton* v. *Brannan,* 141 App. Div. 295; *Seltzer* v. *Reading,* 151 Pa. Sup. Ct. 226.

Nor does the importance or responsibilities of the civil service position change the result. *Stockton* v. *Department of Employment,* 25 Cal. 2d 264, 273-274 (Chief of State Employment Agencies Division); *State Board of Equalization* v. *Superior Court,* 20 Cal. 2d 467, 474 (Supervising Liquor Control Officer, Chief Liquor Control Officer); *LaChicotte* v. *New York,* 166 App. Div. 279 (Principal Assistant Engineer).

The deduction of such outside earnings is not dependent, as petitioner contends, on the existence of a contract and a finding of its breach, but is a sound application of the fundamental principle that a plaintiff should not recover for those consequences of defendant's act which were reasonably avoidable, and which in the instant case were in part avoided, by the plaintiff.[5] *State ex rel. Dresskell* v. *Miami,* 153 Fla. 90, 94; see *Restatement, Agency,* sec. 455, Comment (d); *Restatement, Torts,* sec. 918, Comment (f); Sedgwick, *Damages* (9th ed.), sec. 204.

The Court of Claims, we submit, properly indem-

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[5] Refusal of the courts to deem certain public employment to be contractual in nature is not to be explained, as petitioner implies, as a rejection of the doctrine of avoidable consequences (Pet. 11). Actually, those cases which hold that public employment is not contractual involved the validity, under the Contract Clause of the Constitution (Article I, Sec. 10), of legislative modification of the incidents of the contracts of employment. *Butler* v. *Pennsylvania,* 10 How. 402; *Dodge* v. *Board of Education,* 302 U. S. 74; *United States* v. *Fisher,* 109 U. S. 143.

nified petitioner for the pecuniary loss he suffered. Any larger damage award which failed to deduct outside earnings would have assessed the United States with punitive damages because of an improper discharge resulting from a mistaken interpretation of rules governing petitioner's classification as a probationary or "absolute" employee, and would, at the same time, have gratuitously conferred upon the petitioner far greater compensation that he would have enjoyed had he not been separated from his civil service job.

Those cases, relied upon by petitioner, in which the courts have not applied this well-established rule and have allowed full salary irrespective of outside earnings involved factual situations wholly different from that here involved. Thus, *United States for the use of Crawford* v. *Addison,* 6 Wall. 291, was not a suit against the United States by an improperly-removed civil servant for back salary, but was a suit by a duly-elected mayor against the wrongful usurper of that office for the moneys earned by the latter during the period of time he prevented the plaintiff from taking office.[6] It is

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[6] The facts in that case underscore its complete inapplicability to the issue now here. Crawford had been duly elected Mayor of Georgetown but Addison was wrongfully installed in office. The United States, on the relation of Crawford, then instituted *quo warranto* proceedings against Addison to try title to office and to displace the wrongful incumbent. Crawford was successful in this suit and the court issued a judgment of ouster against Addison. *United States ex rel. Crawford* v. *Addison,* 22 How. 174. However, despite the judg-

clear that the usurper, in such a case, should be held answerable for the salary he improperly appropriated to his own use.

Similarly, *Fitzsimmons* v. *City of Brooklyn,* 102 N. Y. 536, involved a situation in which the position from which the incumbent had been illegally removed had not been filled, and the city, not having paid the salary to anyone else, was directed to turn over the unpaid salary to the wrongfully-suspended employee. Later decisions of the New York Court of Appeals make it clear that a different result would have been reached had the city paid the salary to a replacement. *Matter of Barmonde* v. *Kaplan,* 266 N. Y. 214, 216; cf. *Matter of Mullane* v. *McKenzie,* 269 N. Y. 369, 374, reargument denied, 270 N. Y. 563. Since, as indicated above, another naturalization examiner was transferred to New York City to fill the vacancy created by

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ment of ouster, Addison persisting in his attempts to stay in office, sued out a writ of error to the judgment and furnished a bond to perfect the writ. The writ and bond operated to supersede the judgment of ouster and thus allowed Addison to continue his wrongful tenure in office until such time as the writ of error was dismissed, because of his failure to prosecute it successfully. After the writ's dismissal, which allowed the judgment of ouster to take actual effect, Crawford sued Addison on the bond seeking judgment for the salary received by the intruder during the pendency of the writ of error and the consequent operation of the *supersedeas*. In other words, Crawford sued Addison only for the salary taken by the latter for the period from the date of the bond, which bore the date upon which Addison sued out the writ of error, to the date that Crawford actually got the benefit of the judgment of ouster and took office. It was in these circumstances that this Court allowed the plaintiff all of the moneys wrongfully appropriated by the illegal incumbent.

petitioner's removal from office, the *Fitzsimmons* case is obviously inapplicable.[7]

2. In any event, the issue raised by the petition has no prospective importance whatsoever. The question as to the right of a wrongfully-discharged civil servant to full back pay irrespective of his outside earnings, has been conclusively settled by the recent Act of June 10, 1948, Appendix, *infra*, pp. 12-14. That statute, in amending Section 6 of the Act of August 24, 1912 (37 Stat. 555, 5 U.S.C. 652) so as to confer upon improperly-suspended or removed civil servants the right to back pay for the period of their wrongful dismissal, specifically requires, as did the Court of Claims in the present case, that outside earnings during that period be deducted. The Act requires such a deduction not only with respect to removals deemed necessary to promote the efficiency of the civil service under Section 6(a) of the 1912 Act and under Section 14 of the Veterans' Preference Act of 1944 (58 Stat. 390, 5 U.S.C. 863), but also with respect to wrongful removals in the course of reductions in force. In view of the comprehensive nature of this statute, which expressly sets forth the requirement

[7] Equally inapplicable are the remaining cases discussed by petitioner (Pet. 12, 13). Most of these cases, such as *United States* v. *Andrews*, 240 U. S. 90, and *Glavey* v. *United States*, 182 U. S. 595, are concerned with the right of an army officer to the half pay specifically conferred upon him by statute for the period of his absence with leave. No question of wrongful separation from service, right to back pay during such separation, or deduction of outside earnings from such back pay, is presented in those cases.

of deductibility of outside earnings in these back pay cases, the decision below does not present a question of general importance sufficient to warrant review by this Court.

CONCLUSION

The decision of the Court of Claims is correct. Moreover, the recent enactment of June 10, 1948, eliminates the possibility of the recurrence of the question here presented. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

PAUL A. SWEENEY,
MORTON HOLLANDER,
Attorneys.

AUGUST 1948

APPENDIX

The pertinent provisions of the Act of June 10, 1948 (Public Law 623, 80th Cong., 2d sess.), amending Section 6 of the Act of August 24, 1912 (37 Stat. 555, 5 U.S.C. 652), provide:

"Sec. 6. (a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 14 of the Veterans' Preference Act of 1944, as amended, only if he so elects.

"(b) (1) Any person removed or suspended without pay under subsection (a) who, after filing a written answer to the charges as provided under such subsection or after any further appeal to proper authority after receipt of an adverse decision on the answer, is reinstated or restored to duty on the ground that such removal or suspension was unjustified or unwarranted, shall be paid compensation at the rate received on the date of such removal or suspension, for the period for which he received no compensation with respect to the position from which he was removed or suspended, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period. A decision with respect to any appeal to proper authority under this paragraph shall be made at the earliest practicable date.

"(2) Any person who is discharged, suspended, or furloughed without pay, under section 14 of the Veterans' Preference Act of 1944, as amended, who, after answering the reasons advanced for such discharge, suspension, or furlough or after an appeal to the Civil Service Commission, as provided under such section, is reinstated or restored to duty on the ground that such discharge, suspension, or furlough was unjustified or unwarranted, shall be paid compensation at the rate received on the date of such discharge, suspension, or furlough for the period for which he received no compensation with respect to the position

from which he was discharged, suspended, or furloughed, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period.

"(3) Any person removed or suspended without pay in a reduction in force who, after an appeal to proper authority, is reinstated or restored to duty on the ground that such removal or suspension was unjustified or unwarranted shall be paid compensation at the rate received on the date of such removal or suspension, for the period for which he received no compensation with respect to the position from which he was removed or suspended, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period. A decision with respect to any appeal to proper authority under this paragraph shall be made at the earliest practicable date."

* * * * *

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 141

STANLEY H. BORAK,
Petitioner,

—vs—

THE UNITED STATES.

PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable Justices of the Supreme Court of the United States:

Petitioner respectfully petitions this Court for reconsideration of its decision of October 11, 1948, denying his petition for the issuance of a writ of certiorari to the Court of Claims of the United States in the above-entitled case. The petition should be granted by reason of the following:

THE PETITION SHOULD BE GRANTED UPON THE GROUND STATED IN SCHRIBER-SCHROTH V. CLEVELAND TRUST CO., 305 U. S. 47, 50: BECAUSE THE QUESTION PRESENTED FOR REVIEW CANNOT COME UP IN ANOTHER CIRCUIT, AND IS A QUESTION OF LAW PROPERLY REVIEWABLE BY THIS COURT.

This Court granted certiorari in *Schriber-Schroth* v. *Cleveland Trust Co.*, 305 U. S. 47, 50, stating

> "on a petition for rehearing, litigation elsewhere with a resulting conflict of decision and was improbable, because of the concentration of the automobile industry in the Sixth Circuit."

In the instant case, the divided decision by the Court of Claims involves a question which likewise cannot come up in any other circuit. All suits by officers of the United States for salaries must be brought in the Court of Claims under the "Tucker Act", 28 U. S. C. 41 (20). Therefore, the question in this case as to whether outside earnings of an officer are to be set off against the salary of the office (*United States v. Addison*, 6 Wall. 290, 298), can arise only in that Court. The same question cannot arise in another circuit. Accordingly, the divided decision of the Court of Claims in the instant case, should be reviewed, to settle the law.

Involved in the question presented for review is the scope of two statutes applicable to the Court of Claims, 28 U. S. C. 250 (12 Stat. 765, Mar. 3, 1863), dealing with "set-offs", and 28 U. S. C. 265 (12 Stat. 767; Mar. 3, 1863), concerning "just credits".

The question presented is one which will surely recur in the Court of Claims; indeed, there are cases presently pending in that Court which will be determined by the decision in the instant case.[1]

The law as to whether outside earnings of an officer constitute "just credits" to be offset against the salary of the office, will not be settled until this Court has spoken. Under the rule of the *Schriber-Schroth Co.* case, *supra*, this Court should speak *now*.

THE PETITION SHOULD BE GRANTED TO REVIEW THE DIVIDED OPINION OF A TRIAL COURT, NOT OTHERWISE SUBJECT TO APPELLATE REVIEW.

The shockingly erroneous decision by the Court of Claims in this case was given as a *trial court;* its divided opinion found the majority flouting a rule of law endorsed by this Court, among others; perversely, that Court ignored the Government's concession below that judgment should be for

[1] Among these, and presenting the identical issue for determination, are Kaufman v. United States, No. 47,340, and Goldstein v. United States, No. 47,339.

petitioner in the full amount under the applicable rule of law. Such crass disregard of the settled law by a trial court, requires appellate correction.

Our system of justice contemplates review of the final decision of every trial tribunal on the law. It is recognized as a rule of law that every litigant has the right to one appeal.[2]

The entire rationale of this Court's appellate functioning is to settle the law. To settle the law—for what purpose? Only so that the courts of the United States shall apply uniformly and with fidelity the rules of law so established.

The circuit courts of appeal exist to ensure that the trial courts do not fail to observe the rules of law as settled by this Court, and to offer that detached and objective approach to the issues from which from time to time, the trial court wanders. The circuit courts are *supervisory* courts. The supervisory court over the Court of Claims is *this Court.*

Petitioner asks this Court to grant him the one appellate review to which common concepts of justice and fair play entitle him.

It is clear from the dissenting opinion of Judge Madden, and from the brief of the Government below, that the Court of Claims failed to follow the applicable rule of law; and that, too, in the face of the honest statement in the Government's brief below of the applicable rule. Under the doctrine of *stare decisis et non quieta movere*, this Court should rebuke this case of wilful wandering from that indispensable doctrine.

Congress has not seen fit to interpose between this Court and the Court of Claims any intermediate appellate tribunal. It has granted this Court full power to review decisions of that tribunal. It is this Court's duty to supervise that Court, and to correct its errors. It is incumbent upon this Court to grant with *liberality* certiorari to the Court of

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[2] See Corpus Juris and Corpus Juris Secundum, Appeal and Error, Sec. 1.

Claims where that Court, sitting as *the trial court is itself divided on a question of law.*[3]

Every consideration of law and equity entitles petitioner to review. The writ should issue.

Respectfully submitted,

STANLEY H. BORAK,
Petitioner Pro se.

Certification Under Rule XXXIII.

The undersigned hereby certifies that the foregoing petition is presented in good faith and not for delay, and that the petition is restricted to the grounds specified in Rule XXXIII of this Court.

STANLEY H. BORAK,
Petitioner Pro Se.

[3] This would not unduly burden this Court because the majority of cases in the Court of Claims are concerned with the review of questions of tax law, where the Bureau of Internal Revenue, an administrative body itself having appellate branches, has finally ruled against the taxpayer. Moreover, in tax cases, the same issues do arise in different Circuits.